No. 15,135

IN THE

United States Court of Appeals

For the Ninth Circuit

WOODROW W. REYNOLDS, on behalf of himself and all other taxpayers similarly situated,

Appellant,

vs.

HUGH WADE, as Treasurer of the Territory of Alaska, JOHN MCKINNEY as Director of Finance of the Territory of Alaska, DON M. DAFOE as Commissioner of Education of Alaska, and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN as Members of the Board of Education of the Territory of Alaska,

Appellees.

APPELLANT'S REPLY BRIEF.

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INTRODUCTION.

It is a universal rule in both state and federal Courts that a *city or county taxpayer* sustains a *direct* and *special injury* entitling him to sue where he shows that city or county officials are about to make an illegal expenditure of tax-derived public funds. In

Massachusetts v. Mellon, 262 U. S. 447, the United States Supreme Court points out:

> "The interest of a taxpayer of a municipality in the application of its moneys is *direct and immediate,* and the remedy by injunction to prevent their misuse is not inappropriate."

See also *Crampton v. Zabriskie,* 101 U. S. 601; *Doremus v. Board of Education,* 342 U. S. 429, 433-434; *Everson v. Board of Education,* 330 U. S. 1; *Valentine v. Robertson,* 300 Fed. 521 (9th Cir., 1924); and 18 *McQuillin, Municipal Corporations* (3rd Ed.) §52.04.

It is also a well-nigh universal rule that *state taxpayers* sustain a *direct and immediate* injury entitling them to seek an injunction when they show that an unlawful expenditure of tax-derived state funds is threatened. Thus in *Herr v. Rudolph,* 75 N. D. 91, 25 N. W. 2d 916, the Court relied upon the county taxpayer cases to uphold a suit by a state taxpayer, saying:

> "It is true that these [city and county taxpayer] cases do not involve the expenditure of state funds but we can see no reason why the fact that the instant case does should render the rule there applied inapplicable here."

In our opening brief we cited illustrative cases from thirty state jurisdictions which uphold suits by state taxpayers. Appellees' counsel purport to have found five states not in accord. But the Louisiana case they cite was long ago overruled. See *Graham v. Jones,* 198 La. 507, 3 So. 2d 761. The Oregon case has been distinguished and is not followed in cases like

ours. See *State v. Metschan,* 32 Ore. 372, 46 Pac. 791, and *Evanhoff v. State Industrial Acc. Com.,* 78 Ore. 503, 154 Pac. 106. And serious doubt has been cast on the Washington authorities in cases such as ours where the Attorney General elects to defend the state officials. See *Reiter v. Wallgren,* 28 Wash. 2d 872, 184 Pac. 2d 571. We therefore justifiably assert that state taxpayer suits are today almost universally allowed.

Moreover, this almost universal rule allowing city, county, and state taxpayer suits has been applied again and again to allow suits by *territorial taxpayers* seeking, in cases like ours, to restrain the unlawful diversion of tax-derived territorial funds. The Supreme Court of Hawaii and the Court of Appeals for the First Circuit have both pointed to the *direct* and *special* interest of taxpayers of the Territories of Hawaii and Puerto Rico in preventing an unlawful expenditure of tax-derived territorial funds. For example, in *Castle v. Secretary of Hawaii,* 16 Hawaii 769, 776, the Court said:

> "While equity has not jurisdiction to determine political rights but is confined to questions affecting rights of property, it appears to us that the case presented by the plaintiff *in his capacity as a taxpayer* comes within equitable jurisdiction for *protection of property rights* against acts of executive officers under unconstitutional statutes." (Emphasis ours.)

See also *Buscaglia v. District Court of San Juan,* 145 F. 2d 274 (1st Cir., 1944), Cer. Den. 323 U. S. 793; *Lucas v. American Hawaiian E. & C. Co.,* 16 Hawaii

80; and *Castle v. Kapena,* 5 Hawaii 27; *cf. Bradfield v. Roberts,* 175 U.S. 291.

We come, then, to the conditions of the only real exception to the rule allowing taxpayers to object to the unlawful *diversion of tax-derived public funds.* This exception arises only when:

(1) *Taxpayers of the United States* sue;

(2) To prevent an unlawful diversion of funds from the *United States Treasury.*

In this area only have taxpayer suits generally been disallowed. There are at least four reasons for insistence upon these conditions for this exception.

First, a suit by a *United States Taxpayer* to challenge the validity of a *Congressional appropriation* necessarily involves a review by one branch of the Federal Government (the Judiciary) of the acts of another (the Legislative or Executive). Hence, a conflict with the Separation of Powers Doctrine of the Federal Constitution exists where no justiciable controversy is presented. Secondly, the mass of United taxpayers today numbers in the tens of millions; and to allow taxpayer suits on the *national* level would necessarily open the doors of the Federal Courts to literally tens of millions of taxpayer suits every time a single Congressional appropriation is made. Third, since United States District Courts (as distinguished from territorial District Courts) are traditionally and constitutionally Courts of very limited jurisdiction, the whole process of handling hordes of suits by United States Taxpayers would pose countless new legal and

administrative problems. Finally, while equitable taxpayer suits on the city, county, territorial, and state levels involve a substantial and measurable loss on the part of taxpayers, most United States Taxpayer suits would involve only an infinitesimal, immeasurable, and thus "de minimis" loss, justifying the conclusion that no real "case" or "controversy" would be presented within the meaning of Article III, Section 2 of the Federal Constitution.

In short, policy reasons of a unique and important nature distinguish suits by United States Taxpayers from those by local, territorial, or state taxpayers. As the Court of Appeals for the First Circuit explained so well in the *Buscaglia* case, 145 F. 2d 284:

> "In *Commonwealth of Massachusetts v. Mellon,* the Supreme Court decided as a question of first impression that a *federal taxpayer's* interest in monies in the *United States Treasury* is shared with so many others, *is so comparatively minute* and indeterminable, 'and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.' [262 U.S. 447, 43 S. Ct. 601, 67 L. Ed. 1078]. Then *on grounds of public policy* it reinforced its conclusion that a federal taxpayer, unlike a municipal one with respect to municipal funds, has no standing to seek an injunction against an alleged illegal expenditure of federal funds, and then said that when no justiciable controversy was before it, the doctrine of separation of powers prevented it from interfering with the action of executive officials on the

> ground that the statutes under which they were acting were unconstitutional. It said: 'We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional.' The language of the court in *Commonwealth of Massachusetts v. Mellon* was directed to a case involving the relation of an *individual taxpayer to the Federal Government.* The interest of such an individual, as affected by an alleged illegal expenditure of *federal funds,* was regarded as so minute, indeterminable, and remote, as not to present any substantial case or controversy in the constitutional sense between the plaintiff and the Secretary of the Treasury. BUT THE RELATION OF A TAXPAYER TO THE GOVERNMENT OF PUERTO RICO IS, AS A MATTER OF DEGREE, NOT SO ATTENUATED;" (Emphasis ours.)

Respondents have supplied no valid answer to these compelling points. Instead, they misstate the facts in *Sheldon v. Griffin,* 174 F. 2d 382 (9th Cir., 1949). They ignore the express declaration of the Court in that case at 174 F. 2d 383, that "THE AMENDMENT UNDER ATTACK ADDS NOTHING TO THE BURDEN OF THE TAXPAYERS OF ALASKA." They fallaciously argue that the exceptional rule disallowing suits by United States Taxpayers with respect to Congressional appropriations has applicability to *any* type of taxpayer suit, including those by territorial taxpayers. And they crown their efforts with the patently erroneous proposition that taxpayers as a class suffer no injury different from that of

the general public when tax-derived public funds are illegally diverted.

We shall take up these contentions in the following order.

ARGUMENT.

I. THE CONTENTION OF APPELLEES AND THE CONCURRENCE OF THE DISTRICT COURT THAT TAXPAYERS AS A CLASS SUFFER NO INJURY DIFFERENT FROM THAT OF THE GENERAL PUBLIC WHEN TAX-DERIVED PUBLIC FUNDS ARE ILLEGALLY SPENT IS PATENTLY ERRONEOUS. IT IS PRECISELY BECAUSE TAXPAYERS DO SUFFER DIRECT, SPECIAL, AND IMMEDIATE INJURY THAT THEY—AS DISTINGUISHED FROM MEMBERS OF THE GENERAL PUBLIC—ARE ALLOWED TO BRING CLASS SUITS TO CHALLENGE ILLEGAL EXPENDITURES.

In the Court below appellees moved to dismiss on the ground that the complaint did "not allege that the plaintiff will suffer any injury that will not be suffered in common by the *general public*". (Tr. 13.) The District Court erroneously agreed with this thesis, declaring (Tr. 23):

> "I am unable to find from the allegations of the complaint *that plaintiff has alleged any injury different from that of the general public.* In fact, the allegations of the complaint as noted above are quite to the contrary. *Nor can I agree that the term 'general public' is any different in the legal sense used than 'resident taxpayers,' which 'number many thousands.'* " (Emphasis ours.)

These contentions and conclusions are wrong. They ignore the fact that plaintiff pleaded, confirmed by

the District Court, that plaintiff is a citizen, resident, taxpayer; that all citizen, resident, taxpayers are in the same class as plaintiff and will suffer like injury; that the *funds appropriated are obtained from taxes paid by plaintiff and the taxpayers he represents;* that the funds so appropriated will be spent for illegal purposes and *will thereby be lost from the public funds of the Territory;* that such payment *"will greatly increase the taxes which this plaintiff and the other taxpayers of said Territory are obliged to pay;"* and that said action will therefore *"injure and take from plaintiff and the other taxpayers of said Territory their property and property rights, and will cause him and them irreparable loss"*. (Tr. 4-11.)

What clearer statement of a claim for direct, special and immediate injury could be made! Plaintiff *as a taxpayer* is injured. He sues for himself and the other *taxpayers of his class* who are also injured. He and they are injured because tax-derived funds will be spent for unconstitutional purposes. The injury is direct, immediate, and measurable in a Territory with less than 130,000 persons. The injury occurs because this statute appropriates Territorial money and thereby *adds to the burden of the taxpayers of Alaska. Cf. Sheldon v. Griffin,* 174 F. 2d 383 (There, *"the amendment under attack adds nothing to the burden of the taxpayers of Alaska"*).

Appellees' counsel apparently have realized the error of their argument that the injury here differs in no way from that of the general public. Recall,

both appellees and the trial Court claimed plaintiff's pleading showed no injury to plaintiff different from that of the "general public."

This is an ancient and often rejected argument. Appellees apparently have seen this from reading the cases we cited in our opening brief. For we now find appellees attempting to disavow their former contention by posing a new question. They *now* ask (R.R.B. 2):

> "Whether an Alaskan taxpayer as such, has standing to challenge the constitutionality of a Territorial statute authorizing the expenditure of Territorial funds when he failed to allege that as a result of the enforcement thereof he suffered a direct 'legal injury' different from that suffered by *the generality of taxpayers.*"

Note how appellees no longer talk of the "general public." They now refer to the *"generality of taxpayers."* But in this shift they concede their whole case. For appellees apparently recognize now that taxpayers *do* suffer injury different from that of the general public *when tax-derived public funds are illegally diverted.* So they now assert plaintiff has shown no injury different from that of the "generality of *taxpayers"* (not general public).

And even if so, appellant may sue!

Taxpayers as a class have been injured. And that is precisely why plaintiff has the standing to bring a *class suit.* He sues to prevent any further direct, immediate and special injury to himself *and the taxpayers he represents.*

A moment's glance at cases involving taxpayer suits make two points crystal clear: (1) Taxpayer suits *are* class actions, maintained by one or more of the group of taxpayers on behalf of the group as a whole. Obviously, therefore, plaintiff sustains the same injury as those in the injured class of taxpayers he represents. (2) Taxpayers individually and as a class sustain an injury different from that of the general public where an unlawful diversion of tax-derived funds is involved. The only exception to this latter rule is in the case of (1) taxpayers of the United States (2) to prevent an unlawful diversion of funds from the United States Treasury where the Supreme Court has held, *for special policy reasons,* that the difference between the injury to a United States Taxpayer and that to a member of the general public is so remote and immeasurable as to be "de minimis."

It, therefore, matters little to us whether appellees take their original position that territorial taxpayers sustain no injury different from that of the general public when tax-derived territorial funds are illegally expended; or whether appellees pursue their irrelevant argument that plaintiff's injury as a taxpayer is no different from that of other territorial taxpayers. Plaintiff said enough when he alleged that he and all taxpayers similarly situated will be injured by an illegal expenditure of tax-derived public funds which will add to their burden of taxes. It is because the taxes of plaintiff and those he represents will be illegally diverted to unconstitutional purposes that taxpayers as a class are injured and are entitled to sue.

And because taxpayers as a class are directly injured by reason of having their tax money spent for illegal purposes, their interest and injury are entirely different from the mere political interest of or injury to the general public.

A review of some of the important taxpayer cases will make obvious the fallacious reasoning of both the District Court and appellees.

A clear answer to appellees' arguments can be found in a very recent case challenging the constitutionality of appropriations of tax-derived public funds for parochial school bus transportation and other sectarian purposes. In *Berghorn v. Reorganized School Dist. No. 8,* 260 S.W. 2d 573, the Missouri Supreme Court said at pages 581-582:

> "It is admitted that plaintiffs and each of them are residents and taxpayers of the state of Missouri and of their respective school district. As such taxpayers, there can be no question as to their right and legal capacity to bring and maintain this action *for themselves and on behalf of all others similarly situated* to enjoin the unlawful expenditure of public funds. In such case *proof of illegal and unconstitutional expenditure of such public funds is sufficient to show private pecuniary injury,* because of the taxpayer's equitable ownership of such funds and his liability to replenish any deficiency resulting from the misappropriation. *Castilo v. State Highway Comm.,* 312 Mo. 244, 262, 279 S.W. 673; *Harris v. Langford,* 277 Mo. 527, 211 S.W. 19, 21; 52 *Am. Jur.* p. 3, *Taxpayers' Actions, Sec. 3. If funds* raised by taxation and expressly set apart by law for

the establishment and maintenance of free public schools *are unlawfully expended* upon other and different schools, to-wit, parochial and sectarian schools, contrary to the constitutional mandate, as specifically pleaded by plaintiffs, *the necessary conclusion is that the burden of taxation on the resident tax-paying citizens will be increased.* The free public schools required by law to be established and maintained will have to be established and maintained out of additional funds raised to replace the funds unlawfully diverted. Further, it has been held that in such a case as this, 'where public interests are involved and public funds are about to be dissipated for an illegal purpose,' a taxpayer may maintain the action without being required to show at the trial the extent of the damage which he may sustain if the injunction be refused." [Emphasis ours]

Earlier, in *Castilo v. State Highway Commission,* 312 Mo. 244, 279 S.W. 673, the Missouri Supreme Court pointed up the distinction between taxpayers and the general public, stating at 279 S.W. 675:

"The petition before us contains allegations of fact that defendant is about to cause to be constructed a road without authority of law and contrary to statute, and will unlawfully appropriate and expend thereon large sums of money, raised and to be raised by taxation, which have been provided, designated, and set apart for the one purpose of constructing other and different roads, to the irreparable injury of plaintiffs, and that they have no adequate remedy at law. Respondent says that the petition does not show that plaintiffs' taxes have or will be increased by the acts

of which they complain, or that they will suffer peculiar damage. The petition does not disclose the character or extent of plaintiffs' property, where situated or how specially affected by defendant's alleged unlawful acts, *unless it be through an increase in the burden of taxation.* The allegation that plaintiffs are resident taxpayers, suing for themselves and all other persons similarly situated, is, however, a precursor of other alleged facts evidently intended to show that they will suffer special injury in this way, and to support the general allegation of irreparable injury. The act of the General Assembly establishing certain highways and creating a State-wide connected system of hard-surfaced public roads extending into each county of the state, to be located, acquired, constructed, and improved, and ever after maintained as public roads by the state of Missouri, is pleaded. *If plaintiffs are resident taxpaying citizens, the cost of constructing highways authorized by law will be paid, not by the entire public, but by the taxpaying class of which plaintiffs are members, and which they here represent.* If funds raised by taxation, and expressly set apart by law for the construction of certain highways designated by statute, are expended upon other and different highways not authorized by law, as plaintiffs specifically plead, the necessary conclusion from the facts pleaded is that the *burden of taxation on resident taxpaying citizens will be increased.* The roads lawfully designated will have to be constructed and maintained out of additional funds raised to replace money unlawfully diverted. Failure to allege the ultimate fact that plaintiffs' taxes will

> be increased when this conclusion necessarily arises from facts sufficiently pleaded is not material.
> * * * * * * *
> "It appears from the petition, therefore, that *plaintiffs have a special interest* in the subject-matter of this suit, *distinct from the general public, and have capacity to sue,* and we so hold." [Emphasis ours]

In *Gaston v. State Highway Dept.,* 134 S.C. 402, 132 S.E. 680, the petitioners, suing on behalf of themselves and other taxpayers, sought to restrain the state highway department from constructing a certain road in violation of law. A demurrer was interposed, challenging the petitioners' capacity to sue. The Supreme Court of South Carolina rejected the challenge, stating at 132 S.E. 682:

> "The defendant, relying on the doctrine of public nuisances and wrongs, contends that in order to maintain their action the petitioners must show that they will suffer, through the actions complained of, special or peculiar injury differing in kind, as well as in degree, from that which the public generally will sustain. This doctrine, however, has no proper application to this case, and the authorities cited are therefore not controlling."

Another case pointing out the special and direct injury to a taxpayer, entitling him to sue, is *Terrell v. Middleton,* 187 S.W. 367 (Tex. Civ. App.) where the Court upheld a suit against state officials by a state taxpayer. The Court states at 187 S.W. 369:

"The first assignment of error assails the action of the trial judge in overruling an exception questioning the authority of a taxpaying citizen to institute and maintain a suit to restrain the comptroller from issuing warrants; the reasoning being that the plaintiff has no interest in the subject-matter of this suit, and that the 'pleadings affirmatively show that he has no interest in the suit other than as a citizen and as a taxpayer in general with other citizens and other taxpayers.' The allegations affirmatively showed that appellee as a citizen of Texas and a taxpayer had the right, power, and authority to institute and maintain a suit to restrain state officers from performing illegal, unauthorized, and unconstitutional acts.

* * * * * * *

"Appellee was seeking to prevent the diversion of taxes collected by the state, a portion, no matter how small, of which had been paid by appellee. Citizens are allowed to prevent, by injunction, the collection of illegal taxes, and the reasons for allowing them this power are no stronger than to allow restraint of an officer who seeks to expend the taxes when collected for an illegal or unconstitutional purpose. The diversion of the taxes after collection from legal purposes would be *equally as injurious to the taxpayer* as the collection of illegal taxes. *In either event, the burdens of the taxpayer are increased.*" [Emphasis ours]

In *Democrat Printing Co. v. Zimmercan,* 245 Wis. 406, 14 N.W. 2d 428, a taxpayer sued to enjoin the Secretary of State from approving vouchers for an alleged illegal expenditure. Overruling the contention

that the taxpayer had no standing to sue because he had not shown a substantial injury to himself, the Court said at 14 N.W. 2d 429:

> "The defendants also claim that a taxpayer's action does not lie unless the individual taxpayer plaintiff sustains substantial as distinguished from trivial loss if the expenditures involved be not enjoined. This is not tenable. It is injury to *taxpayers as a class* that is involved in the action and that loss in the instant case is substantial if the expenditures are illegal. The expenditures if they are illegal are continuing and in time would necessarily be of substantial amount." [Emphasis ours]

In *Teer v. Jordan,* 232 N.C. 48, 59 S.E. 2d 359, the plaintiff sued as a state taxpayer to restrain the State Highway and Public Works Commission from illegally diverting public funds. Upholding the right of the taxpayer to maintain the suit, the Court said at 59 S.E. 2d 362:

> "While the activities of governmental agencies engaged in public service imposed by law *ought not to be stayed or hindered merely at the suit of an individual who does not agree with the policy* or discretion of those charged with responsibility, *the right of a citizen and taxpayer* to maintain an action in the courts to restrain the unlawful use of public funds to his injury *cannot be denied.*" [Emphasis ours]

Finally, in the case of *Funk v. Mullan Contracting Co.,* 78 A. 2d 632 Md. Ct. of Appeals) the Court upheld a pleading in a class action by a state taxpayer suing state officials in a case similar to ours. Pointing

out that it is the allegation that illegal expenditures will materially increase taxes that shows the taxpayer's special injury, the Court of Appeals of Maryland said at 78 A. 2d 635:

> "The bill of complaint sets out that the effect of the Act in establishing schedules of wages will materially increase the cost of construction work of the State of Maryland, *and thereby place an additional burden upon the taxpayers of the State.* A taxpayer is entitled to invoke the aid of a court of equity to restrain the action of an administrative agency of the State, when such action is illegal and may injuriously affect the taxpayer's rights or his property, *Masson v. Reindollar,* Md., 69 A. 2d 482, and his right to make such a claim does not depend upon the result; that is, he may be wrong in his contention, but nevertheless he has the right to invoke the aid of the courts to make it. In this case, there is a contention that the Act creating the Commission is void, and that the effect of acting under it will be to increase the cost to the State, and therefore to the taxpayers, of all of its construction work. We think the appellees, as taxpayers, were entitled to bring this suit. The case presented here here is materially different from that in *Phillips v. Ober,* Md., 78 A. 2d 630. *In that case, it was not alleged that the taxpayers would be pecuniarily affected. In the case before us, it is so alleged.*" [Emphasis ours]

And so it is in our case. We show that the burden of taxpayers will be increased by illegal expenditures from the tax-derived General Fund of the Territory of Alaska!

II. APPELLEES MISTAKENLY RELY ON THE MANY FEDERAL CASES HOLDING THAT SUITS BY UNITED STATES TAXPAYERS PRESENT ONLY A "DE MINIMIS" CONTROVERSY. SUCH CASES HAVE NOTHING TO DO WITH SUITS BY CITY, COUNTY, TERRITORIAL, OR STATE TAXPAYERS WHERE A DIRECT, SPECIAL, AND MEASURABLE INJURY IN THE FORM OF AN ADDED TAX BURDEN WILL RESULT FROM AN ILLEGAL EXPENDITURE OF TAX-DERIVED PUBLIC FUNDS. IN FACT, TERRITORIAL TAXPAYER SUITS ARE CLOSELY ANALOGOUS TO COUNTY TAXPAYER SUITS WHICH ARE UNIVERSALLY ALLOWED.

We already have shown that city, county, territorial, and state taxpayer suits are almost universally allowed where an illegal expenditure of the tax-dederived public funds is involved. In fact, appellees expressly concede this point (Brief For Appellees, pages 16-17).

And, as we also have pointed out, these city, county, territorial, and state taxpayer cases have involved injury *to taxpayers* as a class—injury different from that of the general public—an injury direct, immediate and measurable because it is an added tax burden.

Appellees appear to concede this point too, since they rely almost exclusively on the *United States* Taxpayer cases such as *Massachusetts v. Mellon* where there was no *measurable* injury due to the vast sums of money in the U. S. Treasury and the vast number of taxpayers interested therein.

Let us examine the cases appellees cite at pages 7 to 16 of their brief.

Massachusetts v. Mellon involved a suit by *United States* Taxpayer seeking to challenge the validity of a Congressional appropriation from the *United States*

Treasury. Alabama Power Co. v. Ickes, 302 U. S. 464, rejected a suit by a *United States* Taxpayer complaining of allegedly illegal grants and loans from the *United States Treasury. Florida v. Mellon,* 273 U. S. 12, rejected a suit by a *state* which challenged a *United States* Inheritance Tax. *Williams v. Riley,* 280 U. S. 78, rejected a suit by a state taxpayer asserting that *United States Treasury* grants for highways were being improperly applied by a state which was supposed to grant *free* use of the highways, but actually imposed a 3 cents gasoline tax on state users. *Fairchild v. Hughes,* 258 U. S. 126, rejected a suit by *United States* Taxpayers seeking to enjoin the U. S. Secretary of State from issuing a proclamation concerning the suffrage amendment.

Most of these cases hold that a *United States* Taxpayer cannot complain about expenditures *from the United States Treasury* because he sustains only a "de minimis" loss from any given expenditure. The remainder of the cases did not involve *any* loss of tax-derived public funds.

The same thing is true of the Court of Appeals decisions appellees cite. *Elliott v. White,* 23 F. 2d 997, rejected a *United States* Taxpayer suit against the *United States Treasurer. Duke Power Co. v. Greenwood County,* 91 F. 2d 665, rejected a *United States* Taxpayer complaint against *United States Treasury* loans and grants to cities. *Wheless v. Mellon,* 10 F. 2d 893, rejected a suit by a *United States* Taxpayer against the *United States Treasurer. Railway Express, Inc. v. Kennedy,* 189 F. 2d 801, rejected a com-

plaint by a *United States* Taxpayer about the payment of *United States Treasury* funds. *Arkansas-Missouri Power Co. v. City of Kennett,* 78 F. 2d 911, held a *United States* Taxpayer could not question the right of the *United States* to make a loan. *Fallbrook Public Utility District v. U. S. Dist. Court,* 202 F. 2d 942, rejected a *United States* Taxpayer's challenge of an expenditure from the *United States Treasury* for certain federal attorneys.

These cases have nothing to do with our problem. They re-affirm the rule in *Massachusetts v. Mellon* that a taxpayer of the United States has too remote an interest in the funds of the United States Treasury to bring him within the "case or controversy" requirement of the Federal constitutional Courts. The cases have nothing to do with suits by city, county, territorial, and state taxpayers seeking to prevent an added tax burden by reason of a threatened unlawful expenditure of tax-derived city, county, territorial, or state funds.

In fact, how can respondents deny the repeated rulings of Federal Courts that *Federal Courts* can and will entertain *taxpayer suits* whenever the unique "deminimis" problem of *United States* Taxpayers is not present. See *Doremus v. Board of Education,* 342 U. S. 429, 433; *Everson v. Board of Education,* 330 U. S. 1; *Crampton v. Zabriskie,* 101 U. S. 601; *Buscaglia v. District Court of San Juan,* 145 F. 2d 274 (1st Cir.); *Valentine v. Robertson,* 300 Fed. 521 (9th Cir.).

And what of the observation of Judge Reed in *Wickersham v. Smith,* 7 Alaska 522, 535-536, that a

territory is not like a state—*that it is like a county* in that its revenues, property, and very existence depend upon the will of Congress? This distinction was noted by the United States Supreme Court in *First National Bank of Brunswick v. Yankton,* 101 U. S. 129, 25 L. Ed. 1046, 1047:

> "The territories are but political subdivisions of the outlying dominion of the United States. THEY BEAR MUCH THE SAME RELATION TO THE GENERAL GOVERNMENT THAT COUNTIES DO TO THE STATES, and Congress may legislate for them as states do for their respective municipal organizations."

The similarity between territories and counties in the matter of achieving protection for taxpayers is striking. Territorial taxpayers, like county taxpayers, are subject to the whims of political subdivisions when it comes to possible illegal diversions of tax-derived public funds. Territorial taxpayers, like county taxpayers, are protected against these whims by the organic law or constitution enacted by the sovereign entity—the Congress on the one hand and the state on the other. Territorial taxpayers, like county taxpayers, may obtain redress against violations of the organic law in judicial tribunals established by the sovereign power and free from control of the political subdivision. Thus territorial District Courts are federally established and are courts of general jurisdiction with full equity powers, just as county courts are state established and are courts of general equity jurisdiction.

Appellees concede that the jurisdiction of the District Court in this case rested upon the general equity jurisdiction granted by 48 U. S. C. Section 101 (Brief For Appellees, page 2). The judicial clause of the Federal Constitution has no application to Courts created in the territories; and with respect to them, Congress has a power wholly unrestricted by it. *Downes v. Bidwell,* 182 U. S. 244.

The territory of Alaska has a population much smaller than those of a vast number of counties in the United States. Moreover, as the United States Supreme Court observed in *First National Bank of Brunswick v. Yankton,* 101 U. S. 129, the territories bear much the same relation to the Federal government as counties do to the state. In addition, the District Court of Alaska exercises the same general equity jurisdiction that our county trial courts do and thus should afford the same remedy to Alaskan taxpayers as is universally afforded county taxpayers in county trial courts. See *Valentine v. Robertson,* 300 Fed. 521.

But whether appellant's standing to sue be upheld on analogy to county taxpayer suits, or by treating the territory as a state, the authorities are overwhelming in favor of allowing *both* county and state taxpayer suits. Appellees' cases dealing with United States Taxpayers and their remote, infinitesimal interest in the United States Treasury are therefore completely irrelevant.

The cases have so held in respect of Hawaiian and Puerto Rican taxpayer suits! See pages 17 to 26 of our opening brief.

III. APPELLEES ASK THIS COURT TO REPUDIATE THE FIRST CIRCUIT AND HAWAIIAN CASES BY CLAIMING THE NINTH CIRCUIT HAS ALREADY REJECTED TERRITORIAL TAXPAYER SUITS. APPELLEES WRONGLY IGNORE THE PLAIN LANGUAGE OF THIS COURT THAT THE CASE OF SHELDON v. GRIFFIN DID NOT INVOLVE AN EXPENDITURE OF TAX-DERIVED PUBLIC FUNDS AND INVOLVED NO ADDED BURDEN ON TAXPAYERS. THE SHELDON CASE IS LIKE THE RECENT DOREMUS CASE AND INVOLVED NO INJURY TO TAXPAYERS AS SUCH.

Appellees present an absurd spectacle in trying to impeach the statement of facts and plain language of this Court in *Sheldon v. Griffin,* 174 F. 2d 382.

The *Sheldon* decision states clearly and succinctly that the taxpayer in that case was seeking to enjoin the Alaska Unemployment Compensation Commission from granting credits to certain employers and from reducing the waiting period before paying benefits to an unemployed person. The constitutionality of the enabling amendment was challenged. But the Court said there was no justiciable controversy. Its language—plain and clear—is as follows:

> "In his complaint the plaintiff alleged merely that he is a citizen and taxpayer of Alaska. While he offered no proof on the subject we may assume that he occupies that status. The AMENDMENT UNDER ATTACK ADDS NOTHING TO THE BURDEN OF THE TAXPAYERS OF ALASKA. THE UNEMPLOYMENT COMPENSATION FUND administered by the Commission IS MADE UP OF CONTRIBUTIONS EXACTED FROM EMPLOYERS in accordance with regulations prescribed by the Commission, plus fines and penalties collected pursuant to the provisions of the Act. Alaska Compiled Laws

> 1949, §51-5-5. There is nothing in the pleading or proof to indicate that the plaintiff has a particular right OF HIS OWN to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law." (Emphasis ours.)

There is no mystery in this language. The Court says a taxpayer cannot sue if taxpayers as such are not injured. It says that the threatened expenditures would not be made from tax-derived public funds. The threatened expenditures were to be made from a fund composed primarily of *employer* contributions. The employer-contribution fund was not derived from the taxpaying class that plaintiff sought to represent. If the threatened expenditures had been made, not a penny of tax-derived public funds would be spent, only funds contributed by employers. In consequence "The amendment under attack adds nothing to the burden of the taxpayers of Alaska."

We repeat the language of the Court at 174 F. 2d 383:

> "THE AMENDMENT UNDER ATTACK ADDS NOTHING TO THE BURDEN OF THE TAXPAYERS OF ALASKA."

Why? Because no funds collected from those taxpayers were to be spent pursuant to the amendment.

It is therefore apparent why taxpayers could not challenge the amendment. They suffered no special injury. They suffered no injury different from that of the general public. Taxpayers as such had no more

interest than anyone else in the expenditure of funds *collected from employers.*

Appellees seek to confuse the issue by digging up the pleadings in the record of the *Sheldon* case, but appellees cannot alter the *facts* any more than the plaintiff in that case could create a justiciable controversy. No burden was added upon Alaskan taxpayers by the state action there challenged.

Similarly in *Doremus v. Board of Education,* 342 U.S. 429, a taxpayer sued to prevent the reading of the bible in the public schools. The U. S. Supreme Court held the taxpayers had no standing to sue because there was no injury to taxpayers as such. The reading of the bible added nothing to the tax burden. And the court relied on *Massachusetts v. Mellon* rule that there can be no justiciable controversy where taxpayers as such do not sustain an immediate measurable injury.

But note. The U. S. Supreme Court expressly pointed out in the *Doremus* case that taxpayer suits are proper where there is an unlawful diversion of tax-derived public funds. The court said at 342 U. S. 429, 433, 434:

> "This Court has held that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure. Alabama Power Co. v. Ickes, 302 U.S. 464, 478, 479, 88 L. Ed. 374, 377, 378, 58 S. Ct. 300; *Massachusetts v. Mellon,* 262 U.S. 447, 486, et seq., 67 L. Ed. 1078, 1084, 43 S. Ct 597.

The latter case recognized, however, that 'The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate.' 262 U.S. at 486. *Indeed, a number of states provide for it by statute or decisional law and such causes have been entertained in federal courts.* Crampton v. Zabriskie, 101 U.S. 601, 609, 25 L. Ed. 1070, 1071. See Massachusetts v. Mellon, supra (262 U.S. at 486, 67 L. Ed. 1084, 43 S. Ct. 597). *Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury,* we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.' Massachusetts v. Mellon, supra, (262 U.S. at 488, 67 L. Ed. 1085, 43 S. Ct. 597).

"*It is true that this Court found a justiciable controversy in Everson v. Board of Education,* 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504, 168 A.L.R. 1392. *But Everson showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of.* This complaint does not."

* * * * * * *

"*The taxpayer's action can meet this test,* but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought

to litigate here is not a direct dollars-and-cents injury but is a religious difference. *If appellants established the requisite special injury necessary to a taxpayer's case or controversy,* it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here. If the Act may give rise to a legal case or controversy on some behalf, the appellants cannot obtain a decision from this Court by a feigned issue of taxation." [Emphasis ours.]

The basic error of appellees' position is demonstrated by the foregoing language in the *Doremus* case and by the holding of the United States Supreme Court in *Everson v. Board of Education,* 330 U.S. 1.

In the *Everson* case, a suit by a taxpayer to prevent the disbursement of school-district funds for parochial school bus transportation was held to present a justiciable controversy.

The Territory of Alaska constitutes a political subdivision no larger in population than the kind of subdivision involved in the *Everson* case. Our case involves a measurable appropriation of tax-derived funds for parochial school bus transportation, and there is obviously an added burden to the taxpayers of Alaska. Such taxpayers should therefore be allowed to sue just as they were in the Hawaiian and Puerto Rican cases and in the *Everson* case.

The case of *Sheldon v. Griffin* bears no resemblance to ours. It was correctly decided and is inapplicable. Appellees say they have found no case where a distinction has been drawn between those taxpayer suits which involve an added tax burden and those which do not (Brief for Appellees 21). They apparently have chosen to ignore *Everson v. Board of Education,* 330 U.S. 1 and *Doremus v. Board of Education,* 342 U.S. 429.

IV. APPELLEES HAVE FAILED UTTERLY TO ANSWER OUR POINT THAT THE TERRITORY OF ALASKA IS NOT A PARTY TO THIS ACTION AND THEREFORE CANNOT RECOVER ATTORNEYS' FEES AS THE "PREVAILING PARTY".

Appellees have conceded our point by the very statute and rules they cite.

Appellees cite Section 55-11-51 A.C.L.A. 1949. But this section allows attorney's fees only "TO THE PREVAILING *PARTY* . . . BY WAY OF INDEMNITY." We repeat. Only the prevailing *party* may recover attorney's fees. And such fees may be recovered only *by way of indemnity.*

Appellees cite Rule 54(d), Federal Rules of Civil Procedure. Rule 54(d) allows costs only to the prevailing *party.* The Territory of Alaska was not and could not be a party to this suit.

Appellees cite Local Rule 25 for the District Court of Alaska. Rule 25 talks only of attorney's fees "for the prevailing *party.*" The Territory of Alaska was not and could not be a party to this suit.

In countless taxpayer suits, the courts have pointed out that the sovereign was not and could not be a party to the action. The very reason why the action is allowable is because it is not against the sovereign, but rather against officers of the sovereign and which officers are defaulting in their public duties. We therefore say again, the Territory of Alaska is neither the nominal nor the real party in this action. The action was brought against officials of the Territory of Alaska who were about to violate their duty to obey the Organic Law and the Constitution of the United States.

Appellees wrongly state that we claim the territorial officials were "nominal" parties. We made no such statement, nor do we make it now. The territorial officials are the actual parties, the real parties, and the only parties to this suit. Certainly these parties cannot collect attorney's fees *by way of indemnity*. Moreover, they have paid no money whatsoever for the services of an attorney.

Appelees therefore have failed utterly to establish either that the Territory of Alaska is a party to this action or that the prevailing parties in this case suffered a loss for which they may be indemnified. Hence, there can be no recovery of attorney's fees.

CONCLUSION.

For the reasons stated, it is therefore respectfully submitted that the judgment of the District Court, dismissing plaintiff's complaint and ordering that defendant (sic) recover attorney's fees in the amount of $250.00, should be reversed with instructions to deny defendants' motion to dismiss, and with costs to plaintiff.

Dated, November 23, 1956.

Respectfully submitted,

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